

8/13/02

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Paper No. 13
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Zolo Technologies, Inc.

Serial Nos. 76/035,119; 76/035,120; 76/035,301

Thomas D. Bratschun of Swanson & Bratschun, L.L.C. for Zolo Technologies, Inc.

Kelly A. Choe, Trademark Examining Attorney, Law Office 113
(Odette Bonnet, Managing Attorney).

Before Simms, Cissel and Seeherman, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

This is an appeal from the final refusals to register the marks in the above-identified three applications. Because the issues are closely related in each appeal, these cases have been consolidated. The marks, procedural histories and records are only slightly different. All three applications were filed on April 26, 2000. The basis for filing each application is applicant's assertion that it possesses a bona fide intention to use the mark in

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commerce in connection with the goods set forth in the application.

The marks applicant seeks to register are "ZOLO," "ZOLO TECH," and "ZOLO TECHNOLOGIES." The descriptive word "TECHNOLOGIES" has been disclaimed in the application to register the latter mark.

The goods in each application, as amended, are as follows: "fiber optic communications components, namely, optical multiplexers, optical de-multiplexers, optical spectrum analyzers, reconfigurable add/drop multiplexers, electro optic solid state switches and external cavity semiconductor lasers, and multiplexed optical signal attenuators," in Class 9.

The Examining Attorney has refused registration of each of applicant's marks under Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that applicant's marks so resemble the mark "SOLO," which is registered¹ for "optical fiber cable," that if applicant were to use these marks in connection with the fiber optic communications components specified in the applications, confusion would be likely.

¹ Reg. No. 2,150,858, issued on the Principal Register on April 14, 1998 to Siecor Corporation.

Applicant's marks either consist of the term "ZOLO" or combine it with the descriptive or suggestive terms "TECHNOLOGY" or "TECH." "ZOLO" is clearly the dominant portion of the two marks in which it is combined with these terms. The Examining Attorney reasons that confusion is likely because "ZOLO" is similar to "SOLO." He argues that because the letters "S" and "Z" can be pronounced the same way, "ZOLO" and "SOLO" are "essentially phonetic equivalents," (brief, p.7)², and the marks, when considered in their entireties, are similar because they create similar commercial impressions. Further, he takes the position that the goods with which applicant intends to use its marks are closely related to the goods set forth in the cited registration, so that if applicant were to use the marks it seeks to register in connection with the goods listed in the application, confusion with the cited registered mark would be likely.

Applicant disputes the Examining Attorney's assertions, arguing that the marks are not similar and that the goods are not so closely related that the use of the marks in question on them would be likely to cause confusion.

² In this opinion, references will be to the record in application S.N. 76/035,119 unless otherwise indicated.

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Both applicant and the Examining Attorney submitted briefs, but applicant did not request an oral hearing before the Board.

In support of the refusals to register, the Examining Attorney made of record the following: (1) An excerpt from Funk & Wagnalls New Encyclopedia (2000 edition) wherein it is noted that the letter "S" is "pronounced either voiceless, as the hissing sound in sun and nurse, or as a z, the voiced counterpart of s, in such words as prose and tease"; (2) A collection of excerpts from published articles in which words like "hospitalize" and "editorialize" are spelled with the letter "s" in place of the letter "z"; (3) Definitions of the words "multiplexer" and "attenuator" from Harcourt's Academic Press Dictionary of Science and Technology. The former is listed as "a device that allows the transmission of two or more signals on a single line or in a single frequency channel"; the latter as " a resistive or capacitative circuit designed to lower a signal amplitude to some desired value without distorting the signal waveform"; and (4) Copies of a number of third-party trademark registrations wherein the goods listed include switches, multiplexers,

and/or attenuators, in addition to fiber optic cables.³

Applicant made of record three pages from the website of the owner of the cited registration and the declaration of Michael Wearsch, Vice President of Business Development/Marketing for applicant, who explains how the fiber optic market is divided, and that the website information indicates that "SOLO" fiber optic cable is sold to the "outside engineers" at "service providers," whereas applicant's fiber optic components are sold to "facility engineers" at "system providers."

In the case of *E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be considered in determining whether confusion is likely. Chief among these factors are the similarity of the marks as to appearance, pronunciation, meaning and commercial impression, and the similarity of the goods set forth in the application and registration, respectively.

In the case at hand, the record establishes that the goods listed in the application are related to the product

³ Additional materials submitted with the appeal brief of the Examining Attorney have not been considered. Trademark Rule 2.142(d). In any event, they appear to relate to the relationship between the goods listed in the application and the goods specified in the registration, and the record establishes this relationship without the evidence untimely submitted with the brief.

identified in the cited registration. The people who make the decisions to purchase these products can be the same individuals within a given business organization, but these people are sophisticated and knowledgeable with regard to these products. Accordingly, they expend time and exercise care when purchasing these goods, and they would be likely to notice the differences between the marks.

Given this fact and the differences in the marks discussed below, we hold that confusion would not be likely.

Applicant and the Examining Attorney argue at length about the similarities and differences among the marks. The Examining Attorney argues that because one of the marks applicant seeks to register is "ZOLO" and "ZOLO" is the dominant portion of the other two marks applicant seeks to register, the issue boils down to whether "ZOLO" is similar to "SOLO." We cannot adopt his conclusion that these terms are "highly similar" because they both "contain the identical 'OLO' preceded by the phonetic equivalent letters, 'S' and 'Z.'" While it is true that in some instances these two letters can be pronounced in the same way and may be used interchangeably, these facts do not prove the Examining Attorney's contention that "[r]egistrant's mark, SOLO, may be pronounced as SOLO or

ZOLO, and since applicant's mark, ZOLO, may be pronounced as ZOLO or SOLO; therefore, the marks are essentially phonetic equivalents." (brief, p. 7).

Rather, we agree with applicant that when these marks are considered in their entireties, applicant's marks are sufficiently different from the registered mark to avoid a likelihood of confusion. "ZOLO" and "SOLO" do share three letters, but the fact that one begins with the letter "Z" and the other begins with "S" results in significant differences in the way these marks look, the way they are likely to be pronounced, and their connotations, or lack thereof.

The Examining Attorney's argument that these terms are phonetic equivalents is not well taken. Clearly, the mark "SOLO," which is a common English word, would only be pronounced with an "S" sound. As for the mark "ZOLO," we are not persuaded that consumers would pronounce this invented term with an "S" rather than a "Z" sound. The examples provided by the Examining Attorney show only that "S" may be pronounced as "Z," not the reverse. The examples provided by the Examining Attorney which show the letter "S" actually used in place of the letter "Z" are all specifically designated as typical British spellings, rather than the preferred spelling in this country. Even

in the cases where "S" is pronounced as "Z," the examples demonstrate this equivalency in pronunciation only when the letter "S" appears at the end of the word. No example provided by the Examining Attorney is analogous to the present case, i.e., we are provided with no examples where the letters "S" and "Z" are used interchangeably at the beginning of a word. As applicant points out, when these letters are substituted for each other at the beginnings of ordinary words, it is clear that they are not interchangeable. As examples, applicant suggests comparing "singer" to "zinger"; "zip" to "sip"; or "zag" to "sag."

Moreover, the dissimilarities between "ZOLO" and "SOLO" are not limited to differences in appearance and pronunciation. These two terms do not create similar commercial impressions because "SOLO" is a real word with a known meaning, whereas "ZOLO" is not. "SOLO" is understood as a reference to being alone, unaccompanied. In contrast, "ZOLO" is a fanciful term with no ascertainable meaning. We have previously found that the comparison of a known term with an unfamiliar one results in the conclusion that the marks are sufficiently distinguishable to avoid a likelihood of confusion. It is a well-settled principle that the familiar is readily distinguishable from the unfamiliar, and there is a line of decisions recognizing

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the distinction between the two. See: *Laboratoires du Dr. N. G. Payot v. Southwestern Classics Collection, Ltd.*, 3 USPQ2d 1601, at 1606, (TTAB 1987), and cases cited therein.

In the case before us, we hold that if applicant were to use the marks it seeks to register in connection with the goods listed in these applications, confusion with the cited registered mark would not be likely because the marks, in their entirety, are not similar in appearance, pronunciation or connotation, and they create different commercial impressions.

DECISION: The refusals to register under Section 2(d) the Lanham Act are reversed.